Editor's note: Reconsideration denied by order dated Feb. 15, 1979

THERMAL ENERGY CO. ET AL.

IBLA 78-23 Decided August 28, 1978

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting preference right coal lease applications NM 8715 and NM 9764.

Set aside and remanded.

1. Administrative Procedure: Administrative Procedures Act: Licensing: Coal Leases and Permits: Generally

   Where a qualifying discovery of mineral has been made by a permittee during the term of a permit, a coal preference right lease application need not be rejected because it was filed after the permit expired.

2. Administrative Authority: Estoppel -- Coal Leases and Permits: Generally

   Even though the Bureau of Land Management from Jan. 26, 1972, to Aug. 19, 1977, considered preference right coal lease applications in a pending status, it is not estopped to reject such applications as having been filed late because it has not been demonstrated that appellant relied on the Bureau's representations to appellant's detriment.

3. Coal Leases and Permits: Applications -- Coal Leases and Permits: Leases

   Where a coal prospecting permittee demonstrates that lands described in its permit contain coal in commercial quantities, the permittee is entitled to consideration of

a lease to such lands and its request that its coal preference right lease application be restored to its status as a pending preference right lease application may be honored.

APPEARANCES: William G. Webb, Esq., Turner, Hitchins, McInerney, Webb & Hartnett, Dallas, Texas; James W. McDade, Esq., McDade and Lee, Washington, D.C.; Edward H. Forgotson, Esq., Worsham, Forsythe & Sampels, Dallas, Texas; and Mark K. Adams, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Thermal Energy Co., Peabody Coal Co., and Chaco Energy Co. (appellants) have appealed a September 8, 1977, decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting the above-identified preference right coal lease applications.

The prospecting applications and permits (NM 8715 and NM 9764) 1/ were originally issued, effective January 1, 1970, to E. B. LaRue, Jr., and Sharon Allen LaRue.

On June 9, 1971, BLM approved the entire assignments of record title of coal prospecting permits NM 8715 and NM 9764 to Thermal Energy Co., a joint venture of which E. B. LaRue, Jr., was General Manager.

By letter dated November 10, 1971, Thermal Energy Co. requested an extension of 2 years for each of the above prospecting permits. Thermal noted in its letters that 24 test holes had been drilled on NM 8715, and 3 on NM 9764, but that additional geologic work had yet to be conducted. By letters dated December 1, 1971, BLM acknowledged these requests. BLM advised Thermal to submit a statement indicating how much additional time was necessary to complete the prospecting

1/ The land descriptions are as follows:

"(1) NM 8715, San Juan County, New Mexico
T. 20 N., R. 7 W., NMPM
Sec. 3, S 1/2
Sec. 5, Lots 1, 2, 3, 4, S 1/2 N 1/2
Sec. 10, All
Sec. 11, All containing 1,921.02 Acres.

"(2) NM 9764, San Juan County, New Mexico
T. 22 N., R. 10 W.
Sec. 21, SW 1/4 SW 1/4, E 1/2 SW 1/4
Sec. 28, N 1/2 NW 1/4, NW 1/4 NE 1/4
240.00 Acres."

work. By letter of December 3, 1971, Thermal replied, indicating that it expected to use the entire 2-year extension period for exploration work. Thermal's request for the extensions was never formally acted upon by BLM.

On January 24, 1972, the Geological Survey (Survey) advised BLM that it had no objection to the extensions of the permits for a second 2-year period.

On January 26, 1972, Thermal filed requests for the issuance of a preference right coal lease 2/ covering each of the permits. Thermal again pointed out that the required exploration holes had been drilled and that copies of the logs showing depths and thicknesses of the coal seams had theretofore been furnished to BLM.

By memorandum dated March 17, 1972, BLM requested Survey to issue a "report and recommendations" covering appellant's preference right lease applications, and advised Survey that a 50 percent undivided interest in NM 8715 was being assigned to Peabody Coal Co.

On August 9, 1972, BLM wrote appellants as follows concerning the above permits:

> The technical report and environmental analysis concerning the applications for 2-year extensions of the coal permits listed in your August 1, 1972 letter have not been completed. In the meantime, we are check-with our District Office to see where we stand on the reports, but at the same time, please do not neglect to submit the advance rental that will be required on or before January 1, 1973 for the permits in question.
>
> Sincerely yours,
>
> /s/ Raul E. Martinez

The next significant document in the record is a BLM decision dated June 29, 1976, which required appellants to submit "additional data and information" in support of its coal preference right lease applications. With the decision appellants were sent a Notice which in its entirety stated as follows:

> NOTICE TO PREFERENCE RIGHT LEASE APPLICANTS
>
> On May 7, 1976, revision of regulations 43 CFR 3520 were published in the Federal Register (Vol. 41, No. 90),

2/ 43 CFR 3520.1-1(c).

defining "commercial quantities" under 30 U.S.C. 201(b) (coal) and "valuable deposits" under 30 U.S.C. 211(b) (phosphate), 262 (sodium), 272 (sulphur), and 282 (potash). These regulations apply to future applications for preference right leases and to all such applications pending on the effective date of these regulations.

Notice is hereby given to all preference right lease applicants of the minerals named above of the requirements of Sec. 3521.1-1(b) for submitting certain data and information in support of their preference right lease applications. Attention is directed to the provision in the regulations requiring such initial showing to be made within 60 days from May 7, 1976, the effective date of the regulations, or to file a request for an extension of time within which to submit such information.

All applicants are encouraged to file requests for the extension of time allowed by the regulations in order to provide time to review any information previously furnished in support of such applications for adequacy and compliance with the regulations.

Applicants are also advised that the Department will treat any information submitted according to the Freedom of Information Act procedures in 43 CFR Part 2. Any information submitted should be accompanied by a statement indicating the extent to which such information is requested to be held confidential.

Paragraph 10 of the General Comments to the regulations as published in the Federal Register states that the Department will institute a separate rulemaking proceeding before publishing a definition of the "chiefly valuable" standard. Therefore, the short-term criteria will apply only to applications for preference right coal leases.

Applications which meet the short-term leasing criteria shall be processed first. Applicants are requested to submit information which might demonstrate whether or not their application meets the following conditions:

1. If the coal is needed now to maintain an existing mining operation; or

2. If the coal is needed as a reserve for production in the near future.

The information submitted will be used to develop a technical examination/environmental analysis of the area

> covered by the application, 43 CFR 3521.1-4. The purpose of this step is to prepare the report required by 43 CFR 3521.1-5. The report and proposed lease form will then be sent to the applicant, and based on this information he will make a final showing in accordance with 43 CFR 3521.1-1(c).

The revised regulation, referring to "commercial quantities" of coal, 43 CFR 3520.1-1(c) (1976), reads as follows:

> (c) Standards to determine "valuable deposit" and "commercial quantities." A permittee has discovered commercial quantities of coal or a valuable deposit of one of the other permit minerals if the mineral deposit discovered under the permit is of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The permittee must present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the mineral will exceed his costs of developing the mine, and extracting, removing, and marketing the mineral.
>
> (d) Applicability. The standard in paragraph (c) of this section shall apply to all future applications for leases by prospecting permittees, and to applications pending on the effective date of this regulation. Leases which have been issued prior to that date may not be reexamined to determine whether they meet the standards in paragraph (c) of this section.

In response to a March 18, 1976, inquiry as to the status of appellants' permits, BLM, by letter dated July 13, 1976, advised that the permits "are now under preference right lease applications." BLM also advised that it had "no approximate time set for a decision to be made on the issuance of the leases" because it was awaiting the completion of an environmental studies report.

By decision dated August 31, 1976, BLM granted appellants an extension of time to February 21, 1977, to submit data and information in support of their preference right lease applications. By decision dated February 10, 1977, BLM granted a further extension of time, to August 19, 1977, for this purpose.

The decision appealed from, issued on September 8, 1977, gives the following rationale for rejecting appellant's preference right lease applications:

The regulation in force at the time the applications were filed, 43 CFR § 3520.1-1 (1971), provided as follows:

> "A permittee who discovers valuable mineral deposits in the land before his permit expires is entitled to a preference right lease of all or part of the lands in the permit in a reasonably compact form.
>
> (a) Exceptions -
>
> (1) Coal. Showing is required that the land in this permit contains coal in commercial quantities. . . ."

While a request for extension of the prospecting permits was filed on November 10, 1971, it was never granted since the environmental analysis record and technical examination, requested December 1, 1971, were never received in this office.

The permits expired December 31, 1971, and were not extended. This office is not aware of any provision authorizing the retroactive approval of the requests for extensions, filed November 10, 1971. The preference right lease applications were not received until January 26, 1972, i.e., subsequent to the expiration of the permits. Accordingly, the preference right lease applications must be rejected.

Appellants' first contention is that the decision appealed from must be set aside because in 1970 and 1971 a showing was made of the discovery of commercial quantities of coal on lands covered by both permits. Documents appended to appellants' briefs show that during 1970, 1971, and 1972 drilling and prospecting were carried out on the permits and that drill hole logs were sent to Survey. Appellants also present memoranda dated September 26, 1972 (NM-8715), and August 4, 1972 (NM-9764), compiled by a mining engineer of the Survey. The memoranda are reports on appellants' preference right lease applications (Appendices A, appellants' briefs). The report for NM-8715 states that the lands covered contain 14.794 million tons of coal. In conclusion the report states:

> The permittees can be commended for their exploration as they far exceeded our minimum requirements. The reserves and location of the coal beds are now well known and workability is now known as a positive factor. The reserves discovered and known reserves on adjacent lands

> do constitute a mineable unit. A commercial and economic deposit of coal has been discovered and the applicants are entitled to preference right leases.

The report for NM 9764 concludes with the following recommendation:

> It is recommended a preference right lease be granted. The required drilling was performed. The logs of the drill holes submitted and the permit was abandoned properly. The three drill holes discovered an 8-foot bed of coal covering 200 of the 240 acres in the permit and having a reserve of 2.7 million tons of coal.

Appellants' second argument is that BLM should be estopped from rejecting the lease applications by its acts and representations over a 7-year period indicating that the permits were in all respects valid.

The appeal presents the following questions. Did appellants comply with the regulations in effect when their permits were issued so as to protect their rights? If appellants did not so comply, but assuming commercial quantities of coal were discovered, should BLM, by virtue of its actions vis-a-vis appellants be estopped from rejecting the preference right lease applications? The regulations in effect at the relevant time are as follows:

> [43 CFR] § 3511.3 Extensions.
>
> § 3511.3-1 Terms.
>
> (a) Duration. Permits may be extended by an authorized officer of the Bureau of Land Management for a period of 2 years. (1) Exceptions -- (i) Sodium and sulphur. No extension of term will be granted.
>
> § 3511.3-2 Application --
>
> (a) Where and when filed; and copies. Application for extension must be filed in quintuplicate in the proper land office within 90 days prior to expiration of the permit.
>
> (b) Showing required. The application for extension:
>
> (1) Must disclose the reasons additional time is considered necessary to complete prospecting work.

(2) Should consist of copies of timely correspondence or other evidence demonstrating the unsuccessful efforts to obtain the material or labor.

(3) Should state why the permittee's failure to perform diligent prospecting activities was due to conditions beyond his control.

(4) Must show how much additional time is necessary to complete prospecting work.

§ 3511.4-2 Operation of law.

(a) Expiration. If an application for extension is not filed within the specified period, the permit will expire without notice to the permittee and the lands if otherwise available shall be subject to filing of new applications for prospecting permits.

§ 3520.1-1 Preference right leases.

A permittee who discovers valuable mineral deposits in the land before his permit expires is entitled to a preference right lease of all or part of the lands in the permit in a reasonably compact form.

(a) Exceptions -- (1) Coal. Showing is required that the land in his permit contains coal in commercial quantities.

§ 3521.1-1 Forms.

(a) Where and when filed; copies. An application for preference right lease shall be filed in duplicate in the proper land office not later than 30 days after the permit expires. (1) Exception -- (i) Coal. An application for a preference right lease must be filed in duplicate promptly after commencement of commercial operations, but in no event later than the expiration of the period to which the permit is limited.

As we have previously noted, the permits herein were issued effective January 1, 1970. On November 10, 1971, appellants requested that both permits be extended for an additional 2-year period. Thus, appellants complied with 43 CFR 3511.3-2, supra, requiring an application for extension to be filed within 90 days prior to the expiration of the permit. BLM requested appellants to submit the data required under 43 CFR 3511.3-2 in support of an application for an extension.

[1] We note again that appellants' preference right lease applications were filed on January 26, 1972, after lapse of the initial 2-year term of the permits. Where a qualifying discovery of mineral has been made by the permittee during the term of the permit, an application for a preference right lease need not be rejected merely because it was filed after the permit expired. William R. White, 1 IBLA 273, 78 I.D. 49 (1971). Cf. NL Industries, Inc., 10 IBLA 232 (1973). 43 CFR 1821.2-2(g). We perceive no impediment to the acceptance of appellants' applications in this case. Although appellants had made application for extensions of their prospecting permits, signifying that they wished to do further exploration, it is asserted that the work done up to that time had already discovered sufficient deposits of workable coal to qualify for preference right leases. This has been confirmed by the Geological Survey.

The case for accepting the lease applications as timely filed is strengthened by the timely filing of the extension applications. Paragraph 6(b) of the terms of the permit (printed on the back of the permit form) states:

> (b) Application for extension of this permit, where authorized by law or regulation, must be filed, in duplicate, in the proper land office within the period beginning 90 days prior to the date of expiration of this permit. Unless such an application is filed within the time specified, this permit will expire without notice to the permittee. [Emphasis added.]

This indicates that if a timely application for an extension is filed in proper form, the base permit will not expire automatically. In the circumstances, we hold that where a qualifying discovery of mineral has been made by a permittee during the term of a permit, a coal preference right lease application based thereon need not be rejected because it was filed after the permit expired.

[2] BLM, by considering the applications to be in a pending status until August 19, 1977, would not be estopped from rejecting them as having been untimely filed on January 26, 1972.

Cases involving estoppel against the Federal Government include United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970). In Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960), the court stated that:

> Four elements must be present to establish the defense of estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted

> on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 9 Cir., 228 F.2d 520, 525.

Element numbered 4 is clearly not present in the case at bar, even assuming, arguendo, that the other criteria were satisfied.

[3] Throughout the history of this case BLM treated appellants' permits as valid and their preference right lease applications as pending. At no time, however, did BLM make a finding whether the subject lands contained coal in commercial quantities (43 CFR 3520.1-1) even though the facts necessary for such a finding were available, and the Survey explicitly recognized that coal in commercial quantities had been discovered during the life of the initial permits. Under the old as well as the new regulations entitlement 3/ to a preference right lease is contingent only upon a showing of commercial quantities of coal discovered prior to the expiration of the permit. Peter I. Wold II, 13 IBLA 73, 80 I.D. 623 (1973). J & P Corp., 13 IBLA 83 (1973). It cannot be made to hinge upon the lack of communication between Survey and BLM and/or the lack of expeditious processing in the latter office. The reports from Survey placed in evidence by appellants demonstrate the discovery of the presence of coal in commercial quantities on the subject lands prior to the expiration of the permits. Appellants are therefore entitled to have their preference right lease applications retained as valid preference right applications. 4/ Nothing in the Act of August 4, 1976, 30 U.S.C.A. §§ 201-209 (West Supp.) vitiates this conclusion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

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3/ However, the Secretary's memorandum of February 16, 1977, provides in part that: "Until further notice, there will be no leases issued for coal * * * without my expressed approval." If all else be regular, the consent of the Secretary should be sought.

4/ We are not granting the preference right lease, but merely restoring the applications to a pending status. This action is not inconsistent with the stipulations entered into on April 6, 1978, by the parties in NRDC v. Hughes, Civ. Action No. 75-1, D.C.D.C.

decision appealed from is set aside and the cases remanded for action consistent with this opinion.

Frederick Fishman
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE HENRIQUES DISSENTING:

I must respectfully dissent from the holding of the majority, although I confess sympathy toward the appellant in the circumstances of this case.

The regulation in effect at the time the application for preference right lease was filed read as follows:

> § 3521.1-1 Forms.
>
> (a) Where and when filed; copies. * * *
> (1) Exception - Coal. An application for a preference right lease must be filed in duplicate promptly after commencement of commercial operations, but in no event later than the expiration of the period to which the permit is limited.

As the application was not filed prior to the expiration of the prospecting permit on which it is based, I think BLM had no choice but to reject the application, even though it waited an unseemly time before taking such action.

Douglas E. Henriques
Administrative Judge